APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT SUBMITTED AUGUST 6, 2002 AND FILED OCTOBER 21, 2002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35819
D.C. No. CV-00-00206-JKS

In re: BANKRUPTCY ESTATE OF MARKAIR, INC.,

Debtor.

WILLIAM BARSTOW, III,

Appellant,

v.

UNITED STATES INTERNAL REVENUE SERVICE,

Appellee.

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, Chief Judge, Presiding

Argued and Submitted
August 6, 2002—Anchorage, Alaska

Filed October 21, 2002

Appendix A

Before: Betty B. Fletcher, Arthur L. Alarcón, and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

OPINION

GRABER, Circuit Judge:

William Barstow, Trustee of the bankruptcy estate of MarkAir, Inc. (MarkAir), seeks to subordinate the proceeds of a judicial lien securing taxes owed to the United States Internal Revenue Service (IRS). The Trustee relies on § 724(b) of the Bankruptcy Code, 11 U.S.C. § 724(b), which subordinates tax liens to the claims of certain priority unsecured creditors. The bankruptcy court denied the Trustee's request to subordinate, and the district court affirmed. The Trustee appeals and we, too, affirm. We hold that the term "tax lien" in § 724(b) means a statutory tax lien and that the term does not embrace a judicial lien securing an underlying tax obligation.

FACTUAL AND PROCEDURAL HISTORY

In June of 1992, MarkAir filed for bankruptcy under Chapter 11. When the company filed its petition, it had an outstanding liability for air transportation excise taxes. However, the IRS had not yet filed a Notice of Federal Tax Lien with respect to this liability and, accordingly, had no statutory tax lien.

Thereafter, MarkAir concluded that it had overpaid certain taxes and requested a refund. The IRS asserted a right to offset the amount of the overpayment against the outstanding tax liabilities of MarkAir and its parent corporation.

MarkAir moved for an order in the bankruptcy court allowing it to use the overpayment to secure its obligations to the Airline Reporting Corporation (ARC), a ticket clearinghouse used by travel agents. ARC had threatened to stop clearing MarkAir's tickets—which essentially would have shut down the airline's business—unless MarkAir posted a letter of credit in the amount of $1.8 million.

To avoid an immediate shutdown of MarkAir's operations, the IRS and MarkAir compromised their positions and entered into an agreement with ARC. The IRS agreed to forego its offset claim and to allow a portion of the overpayment, $1.8 million, to be deposited with the bankruptcy court as the ARC collateral. MarkAir agreed that the balance of the overpayment, approximately $1.3 million, would be paid immediately to the IRS. Further, it agreed that any amount of the collateral remaining upon termination of the agreement with ARC would be paid to the IRS.

Under the agreement, ARC was given a "first judicial lien position" against the collateral, and the IRS was given a "second place judicial lien position." The bankruptcy court approved the compromise between the IRS and MarkAir and ordered that the "protections" afforded to the IRS under the court's order "shall remain in full force and effect in the event

that [MarkAir's] case is converted to another chapter under the . . . Code (or reconverted to Chapter 11) or any subsequent case is filed by or against [MarkAir] under the Code."

MarkAir failed to meet its obligations under the confirmed bankruptcy plan and, in April 1995, filed a second Chapter 11 petition. MarkAir soon ceased operations and, in November 1995, the case was converted to one under Chapter 7. ARC then released its claim against the collateral, and the IRS moved for distribution of the collateral pursuant to the parties' agreement. The Trustee opposed the request. Pursuant to 11 U.S.C. § 724(b), he sought to subordinate the IRS's lien so that he could pay administrative expenses and the claims of other priority creditors.

The bankruptcy court concluded that subordination under § 724(b) was intended to apply to "statutory" tax liens, but not to the "contractual type of lien involved in this case." The court first held that the text of the statute was sufficiently ambiguous to permit the court to explore legislative history for guidance as to Congress' intent. Based on its analysis of the statute's legislative history and text, the court then held that the subordination of tax liens in § 724(b) applies only to statutory liens. Accordingly, the IRS was entitled to recover the full amount of its collateral, namely, the $1.8 million deposit and accrued interest.

The Trustee appealed, arguing that because the IRS's "judicial lien . . . secures an allowed claim for tax, it is a 'lien' within the meaning of § 724(b) and is subject to tax lien subordination." The district court rejected the Trustee's

argu-ment and affirmed for the reasons stated in the bankruptcy court's decision. The Trustee filed a timely notice of appeal.

STANDARDS OF REVIEW

We review de novo the district court's decision on an appeal from a bankruptcy court. *Neilson v. Chang (In re First T.D. & Inv., Inc.)*, 253 F.3d 520, 526 (9th Cir. 2001). We review the bankruptcy court's conclusions of law de novo and its factual findings for clear error. *Id.* We review de novo questions of statutory construction. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001).

DISCUSSION

A. *Text of § 724(b)*

The parties' dispute centers around § 724(b) of the Bankruptcy Code, a provision that partially subordinates tax liens to the claims of a number of other parties, including some priority unsecured claimants. That subsection provides:

> Property in which the estate has an interest and that is *subject to a lien* that is not avoidable under this title and *that secures an allowed claim for a tax*, or proceeds of such property, shall be distributed—
>
> (1) first, to any holder of an allowed claim secured by a lien on such property that is not

avoidable under this title and that is senior to *such tax lien*;

(2) second, to any holder of a claim of a kind specified in section 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by *such tax lien*;

(3) third, to the holder of *such tax lien*, to any extent that such holder's allowed tax claim that is secured by *such tax lien* exceeds any amount distributed under paragraph (2) of this subsection;

(4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to *such tax lien*;

(5) fifth, to the holder of *such tax lien*, to the extent that such holder's allowed claim secured by *such tax lien* is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

11 U.S.C. § 724(b) (emphasis added).

The parties agree that the IRS's lien on the ARC collateral is a "judicial lien," which is defined in the Bankruptcy Code

as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(36). We also agree with this characterization because the IRS's lien arose as a result of a legal proceeding.

However, the Trustee and the IRS advance markedly different views as to the significance of this characterization. The IRS argues that § 724(b) applies only to statutory tax liens and, therefore, that the statute does not require subordination of the IRS's claim. *Id.* § 101(53). By contrast, the Trustee argues that the statute applies to any kind of lien that secures an allowed claim for tax. Accordingly, he claims that the IRS's lien is subordinated to unsecured priority claimants pursuant to § 724(b)(2).

The Trustee and the IRS assert that their respective interpretations of § 724(b) are mandated by the "plain meaning" of the statute's text. *See FDIC v. County of Orange (In re County of Orange)*, 262 F.3d 1014, 1018 (9th Cir. 2001) ("In construing a statute, we first consider its text." (citation and internal quotation marks omitted)). Neither party is correct. Although the text of the statute provides some support for the Trustee's interpretation, Congress' frequent use of the term "tax lien" in § 724(b) interjects ambiguity.

1. *Widely Acknowledged Meaning of "Tax Lien"*

The term "tax lien" appears seven times in § 724(b). The statute does not define it. When a term is undefined, we usually apply its common meaning. *See Romine v. Diversified Collection Servs., Inc.*, 155 F.3d.1142, 1145 (9th Cir. 1998) ("In the absence of statutory definition,

a statutory term will be accorded its ordinary meaning."). Further, "[w]ords with a fixed legal or judicially settled meaning, where the context so requires, must be presumed to have been used in that sense." *Huffman v. Commissioner*, 978 F.2d 1139, 1145 (9th Cir. 1992). The IRS argues that the phrase "tax lien" is a term of art with a widely accepted meaning in tax and bankruptcy law—a statutory tax lien—and that Congress must be deemed to be familiar with the established meaning.

The term "tax lien" does, in general, refer to statutory tax liens. The weight of the relevant case law so holds. *See, e.g., In re Khoe*, 255 B.R. 581, 588 (Bankr. E.D. Cal. 2000) ("A federal tax lien is neither a judicial lien nor a non-possessory, nonpurchase money security interest."); *Filipovits v. IRS (In re Filipovits)*, No. 94-5-8134-SD, 1995 WL 724520, at *1 (Bankr. D. Md. Sept. 20, 1995) ("A tax lien is a statutory lien; and it is not a judicial lien."); *Robinson v. United States (In re Carolina Resort Motels, Inc.)*, 51 B.R. 447, 450 (Bankr. D.S.C. 1985) ("[T]he legislative history clearly indicates that tax liens are statutory liens.").

Similarly, a number of prominent secondary authorities note that the typical statutory lien is the tax lien. *See, e.g.*, 2 Collier on Bankruptcy ¶ 101.53, at 101-48 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2002) ("Good examples of statutory liens are tax liens. . . ."); 1 Robert E. Ginsberg & Robert D. Martin, Ginsberg and Martin on Bankruptcy § 6.02[D][2], at 6-30 (4th ed. 2001) ("Typical statutory liens are mechanics' liens and tax liens."). Black's Law Dictionary 1459 (6th ed.1990) defines a "tax lien" generally as:

> A statutory lien, existing in favor of the state or municipality, upon the lands of a person charged with taxes, binding the same either for the taxes assessed upon the specific tract of land or (in some jurisdictions) for all the taxes due from the individual, and which may be foreclosed for non-payment, by judgment of a court or sale of the land.

Finally, the Bankruptcy Deskbook notes that "[a] federal tax lien is not a judicial lien." 1 William C. Hillman & Margaret M. Crouch, Practising Law Institute: Bankruptcy Deskbook § 1:4.2, at 1-11 n.28 (3d ed. 2001).

If Congress intended to adopt the common meaning of "tax lien" when it enacted § 724(b), then, "tax lien" would refer only to statutory liens, not judicial liens.

2. *Context and Structure of the Bankruptcy Code*

The Trustee responds by arguing that it is irrelevant that the term "tax lien" commonly refers to a statutory tax lien; the only relevant question is how *Congress* intended the term to be used in § 724(b). The Trustee is correct in stating that, when Congress defines a term, courts are to apply that definition in interpreting the meaning of the statute. *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."); *United States v. Yochum (In re Yochum)*, 89 F.3d 661, 666 (9th Cir. 1996) ("[I]n statutes that contain statutory

definition sections, it is commonly understood that such definitions establish meaning wherever the terms appear in the same Act.").

As noted, however, Congress failed to define "tax lien" in the statute, even though § 101 of the Bankruptcy Code defines a number of related terms. For example, § 101 defines a "lien" generally as a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37). A "statutory lien" is defined as a

> lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

Id. § 101(53). A "judicial lien" means a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." *Id.* § 101(36). Finally, a "security interest" is defined as a "lien created by an agreement." *Id.* § 101(51). These definitions do not tell us directly what Congress meant when it used the term "tax lien."

The Trustee acknowledges that the term "tax lien" appears seven times in § 724(b) but points out that in each instance "tax lien" is preceded by the word "such." He asserts that "such" amounts to a reference throughout § 724(b) to the complete antecedent in subsection (b), namely, "a lien that is not avoidable under this title and that secures an

allowed claim for a tax." 11 U.S.C. § 724(b). The foregoing phrase refers only to a "lien," which can include either a statutory lien or a judicial lien. Thus, he argues, Congress intended the phrase "such tax lien" to be defined by reference to subsection (b) and § 101(37) and thereby intended to supplant the traditional meaning of "tax lien" in § 724(b).

Although the Trustee's parsing of the section is logical, the word "such" will not bear so much weight in this context. In 11 U.S.C. § 724(b)(3), for example, the third payout is to the holder of the tax lien, "to any extent that such holder's *allowed tax claim that is secured by such tax lien* exceeds any amount distributed under paragraph (2) of this subsection." (Emphasis added.) If the Trustee's interpretation were correct, the emphasized phrase "such tax lien" instead would read simply "a lien"; otherwise the repetition of "tax" is redundant. *See United States v. Handy*, 761 F.2d 1279, 1280 (9th Cir. 1985) ("A statute should be construed so as to avoid making any word superfluous."). In the context of this subsection, at least, Congress appears to have used the term "tax lien" to mean a subset of the larger term "lien."

Additionally, § 724(d) of the Bankruptcy Code states: "A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1986 shall be treated under subsection (b) of this section the same as if such lien were a tax lien." 11 U.S.C. § 724(d). In other words, statutory liens whose priority is established in the same manner as the priority of a tax lien under § 6323 are treated as if they are tax liens. In subsection (d), the phrase "tax lien" at the end of the sentence refers back to "a tax lien under section 6323

of the Internal Revenue Code of 1986"—a statutory tax lien. Ordinarily, "such" refers to an antecedent phrase. In § 724, however, only subsection (d) explains fully what a "tax lien" might mean. Although it is unusual grammatically, Congress may have used "such tax lien" in § 724(b) to refer to the kind of "tax lien" identified fully in § 724(d).

Because neither party's reading of "tax lien" is obviously correct, the statute is ambiguous. When a statute's text is ambiguous, we look to legislative history as an aid to discerning congressional intent. *See Merkel v. Commissioner*, 192 F.3d 844, 848 (9th Cir. 1999) ("[I]f the statute is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation." (citation and internal quotation marks omitted)); *N.W. Forest Res. Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996) ("Where a statute is ambiguous, we may look to legislative history to ascertain its purpose."). We turn next, then, to legislative history.

B. *Legislative History of § 724(b)*

Unfortunately, the legislative history of § 724(b) is not entirely clear. On balance, however, it supports the IRS's interpretation of the statute.

Section § 724(b) was added to the Bankruptcy Code in 1978. The relevant portion of its predecessor provision, § 67c of the Chandler Act, provided:

> *Every tax lien* on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and

> (2) of subdivision (a) of section104 of this Title. Where *such a tax lien* is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived from the sale of the personal property to which the *tax lien* attaches, less the actual cost of that sale, of an amount not in excess of the *tax lien*, to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this Title. If the amount realized from the sale exceeds the total of such debts, after allowing for prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this Title and the amount of the *tax lien*, is to be paid to the holder of the *tax lien*.

11 U.S.C. § 107(c)(3) (codifying § 67c) (superseded by § 724(b) in 1978) (emphasis added).

The legislative history of § 67c of the Chandler Act demonstrates that, when Congress used the term "tax lien" in the statute, it intended the term to mean only statutory liens. The report of the Senate Committee on the Judiciary stated that "the effect of section 67c is limited to statutory liens and does not include consensual liens." S. Rep. No. 89-1159 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2456, 2460. Further, Congress noted that "new section 67c establishes more effective standards for the treatment of statutory liens." *Id.* at 2462. As the leading bankruptcy treatise explained the legislative history of the Act, "[n]onstatutory tax liens[were] not affected by § 67c." 4 Collier on Bank-

ruptcy ¶ 67.27, at 377 (Lawrence P. King ed., 14th ed.1978). Thus, the provision of the statute that § 724(b) replaced had *no* subordinating effect on judicial liens or on contractual liens ("security agreements" under the current code), even when those types of liens secured an allowed claim for tax.

The committee reports produced in the drafting and enactment of § 724(b) suggest that this result is unchanged under the new code. As the report of the House Committee on the Judiciary explains, § 724(b) "governs tax liens. It is derived from section 67c(3) of the Bankruptcy Act, *without substantial modification in result.*" H.R.Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6338 (emphasis added). Similarly, the report states: "Tax liens are also included in the definition of *statutory lien.*" *Id.* at 6271 (emphasis added). The report also explains that "[t]he House amendment modifies present law by requiring the subordination of tax liens." *Id.* at 6501. These passages in the legislative history show that Congress intended the term "tax lien" in § 724(b), like in § 67c(3) of the Chandler Act, to refer only to statutory liens.

While the Trustee correctly counters that the legislative history of § 724(b) demonstrates that the reach of that section is broader than that of its predecessor, § 67c, nothing in that history suggests that the particular ways in which § 724(b) is broader than § 67c have anything to do with the distinction between statutory and other types of tax liens. Rather, § 724(b) appears simply to expand the *types of property* to which a subordinated tax lien may be attached:

> The House amendment modifies present law by requiring the subordination of tax liens on both

> real and personal property to the payment of claims having a priority. This means that assets are to be distributed from the debtor's estate to pay higher priority claims before the tax claims are paid, even though the tax claims are properly secured. Under present law and the Senate amendment only tax liens on personal property, but not on real property, are subordinated to the payment of claims having a priority above the priority for tax claims.

H.R. Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6570. As Collier notes:

> Section 724(b) is considerably broader, however, than was section 67c(3). Section 67c(3) applied only to tax liens on personal property unaccompanied by a change of possession. It did not apply to tax liens on real property nor did it apply to tax liens on personal property where the lienholder obtained possession of the property prior to bankruptcy. In contrast, section 724(b) applies to all types of property and is not dependent on possession.

6 Collier on Bankruptcy ¶ 724LH[2], at 724-19 to -20.

In summary, the better reading of the legislative history is that Congress intended to confine the application of § 724(b) to statutory liens. Nonetheless, because the text, context, and legislative history do not provide a definitive

answer, we next consider cases interpreting § 724(b) and the public policy considerations underlying Congress' enactment of the statute.

C. *Cases*

The Trustee and the IRS cite a number of cases in support of their respective interpretations. However, the parties' citations and our own research have not uncovered any decision addressing the same issue that we face.

The Trustee argues that two cases discussing the validity of cash collateral orders support his position. *In re Bino's Inc.*, 182 B.R. 784 (Bankr. N.D. Ill. 1995); *In re Life Imaging Corp.*, 131 B.R. 174 (Bankr. D. Colo. 1991). Although those cases contain isolated passages favoring the Trustee, neither is entirely on point because the IRS in both cases already had a *statutory* lien on the property in question, which was converted to a judicial lien by agreement of the parties. The courts in those cases thus focused on the fact that, by compromising the tax claim, the trustee was "bargain[ing] away the tax lien subordination provisions of § 724(b)" and attempting to "override the subordination provisions of § 724(b)." *Bino's*, 182 B.R. at 787-88.

In the present case, however, the IRS did not have a statutory lien on the ARC collateral but, instead, had actual possession of the funds. Therefore, in the absence of the parties' agreement, there would have been *no* lien to subordinate pursuant to § 724(b). Accordingly, the parties cannot be said to have been "bargaining away" or "overriding" § 724(b), and *Life Imaging* and *Bino's* are inapposite.

Moreover, those two decisions do not represent the only approach adopted by courts in cash collateral order cases. For example, in *In re Buzzworm, Inc.*, 178 B.R. 503, 505 (Bankr. D. Colo. 1994), the court concluded that enforcement of a cash collateral agreement need not violate the statute: "[A] tax lien creditor, under the right circumstances, may avoid, by agreement, the distribution scheme under Section 724(b). . . ." The court's rejection of the approach adopted in *Bino's* and *Life Imaging* is well reasoned and relies on the text of the statute, its legislative history, and public policy considerations. *Id.* at 509-12. Thus, contrary to the Trustee's claims, the cash collateral cases do not necessarily support his interpretation of § 724(b).

Other cases discussing § 724(b) are of little help in determining whether the statute applies to judicial liens. Accordingly, we move to our final consideration: the policies underlying Congress' enactment of the statute and the policy consequences of adopting each party's construction of § 724(b).

D. *Policy*

When one considers Congress' primary purpose in enacting § 724(b), the IRS's construction might, at first glance, seem illogical. As both parties properly concede, an important purpose of § 724(b) is to offer some protection to certain priority claimants—such as spouses, dependent children, farmers, fishers, consumers, and employees—from tax claims that otherwise would consume most or all of the bankruptcy estate. *See Gouveia v. IRS (In re Quality*

Health Care), 215 B.R. 543, 557 (Bankr. N.D. Ind. 1997); *see also N. Slope Borough v. Barstow*, No. 01-35892, __ F.3d __, __ (9th Cir. 2002) (decided this date) (op. at 16) (holding that the language of § 724(b) unambiguously establishes partial subordination of tax liens to the interests of priority unsecured creditors). If the purpose of the statute is truly to protect priority claimants and to ensure that they are paid before the taxing authorities are, it seems implausible that Congress intended to distinguish among different types of liens.

On the other hand, when viewed from another perspective, the IRS's construction of the statute is entirely reasonable. Congress enacted § 67c of the Chandler Act in response to similar concerns about protection of administrative and wage claimants yet, as discussed above, Congress clearly chose to limit the application of subordination to only statutory claims. In balancing the competing interests of tax lienholders and priority unsecured claimants, Congress easily could have concluded that the fairest course of action was to subordinate some, but not all, liens securing claims for tax.

Further, the policy consequences of adopting the IRS's view are more consonant with the overall bankruptcy scheme. The IRS had MarkAir's tax refund in its possession, and the IRS's potential right to retain the refund did not arise pursuant to any type of lien. That is, under either party's view of the statute, the IRS's claim to the refund was not originally subject to subordination under § 724(b). Only when the refund was offered to MarkAir for use in the company's reorganization did the IRS's claim become secured with a

judicial lien. In that circumstance, the IRS was acting in its capacity as an "ordinary" creditor, not in its capacity as a tax collector.

Under the Trustee's interpretation, the IRS's claim to the refund was transformed into a subordinated claim simply because the IRS entered into an agreement with the company for release of the refund for use in reorganization. That reading of the law would discourage taxing authorities from releasing any funds that otherwise could be used to resurrect a failing company. This concern was a significant factor motivating the *Buzzworm* court to hold that cash collateral orders may modify the operation of § 724(b):

> [T]here are strong practical and policy reasons for enforcing such Chapter 11 agreements [protecting tax claimants from the operation of § 724(b)] against a Chapter 7 trustee. Enforcing such agreements will encourage lien creditors to better cooperate with a reorganizing debtor and reduce pressure, early in the case, to litigate and, perhaps, prematurely "pull the plug" on a debtor.

Buzzworm, 178 B.R. at 509.

We think that Congress intended to encourage the kind of behavior that the IRS exhibited in this case; it left money in the estate when it was not required to do so, in the hope of assisting MarkAir to survive. That behavior furthers the overall purpose of the Bankruptcy Code.

E. *Conclusion*

The text of § 724(b) is ambiguous. Its context, structure, legislative history, and purpose convince us that Congress intended the phrase "tax lien" to refer to statutory tax liens and not to judicial liens securing the payment of taxes. Accordingly, we affirm the decision of the bankruptcy court and the district court.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA DATED AND FILED AUGUST 3, 2001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. A00-0206 CV (JKS)

WILLIAM BARSTOW, III, TRUSTEE FOR THE BANKRUPTCY ESTATE OF MARKAIR, INC.,

Appellant,

vs.

INTERNAL REVENUE SERVICE,

Appellee.

ORDER

INTRODUCTION

Presently before the Court is an appeal filed by Appellant William Barstow, III, Chapter 7 Trustee, for the bankruptcy estate of MarkAir, Inc. ("MarkAir" or "Debtor") of the United States Bankruptcy Court for the District of Alaska's decision that tax lien subordination under 11 U.S.C. § 724(b) is limited exclusively to tax claims which are secured by a statutory lien. *See* Docket No. 17 (Appeal); 20 (Opp'n); 24 (Reply).

Appendix B

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts are not in dispute. *See* Docket Nos. 17; 20. In June of 1992, MarkAir filed for bankruptcy under Chapter 11. *See* Docket No. 17 at 4.

> At the time Debtor filed its petition, it had an outstanding air transportation excise tax liability for the first and second quarters of 1992. (The [Internal Revenue Service ("Service")] did not file a Notice of Federal Tax Lien with respect to these amounts against the Debtor.) Subsequently, the debtor concluded that it was entitled to an overpayment. The Service asserted a right to offset the anticipated overpayment against the outstanding tax liabilities of the Debtor and [Alaska International Industries, Inc.]. The Debtor then moved the Bankruptcy Court for an order allowing it [to] use any overpayment to secure its obligations to the Airline Reporting Corporation (hereinafter "ARC"). This was necessary because, at the time the Debtor determined that it was due an overpayment, ARC, a ticket clearinghouse used by travel agents, demanded that the Debtor post a letter of credit in the amount of $1,800,000.00. If the Debtor failed to provide such a bond, ARC indicated that it would no longer clear tickets and, in essence, shut down the Debtor's operations.
>
> In order to avoid an immediate shut down of the Debtor's operations, the Service and the Debtor compromised their positions and entered into an agreement with ARC (hereinafter the

"Collateral Agreement"). . . . The Service agreed to forgo its offset claim, as well as the statutory 90-day period to review the application for tentative refund. A portion of the overpayment, $1,800,000.00, would be deposited with the registry of the Bankruptcy Court as the ARC collateral (hereinafter the "ARC Collateral"), and the balance of the overpayment, approximately $1,300,000.00, would be paid to the Service. The amount of the ARC Collateral remaining upon termination of the Collateral Agreement, if any, then would be paid over [to] the Service.

As reflected in the Collateral Agreement, ARC was given a "first judicial lien position" against the ARC Collateral and the Service was granted a "second place judicial lien position" against the ARC Collateral. . . . By Order Authorizing MarkAir to Establish a Collateral Deposit Pursuant to 11 U.S.C. § 364(d), dated April 12, 1993 (hereinafter the "Collateral Order)," . . . the Bankruptcy Court approved the compromise between the Debtor and the Service as set forth in the Collateral Agreement. In its Order Confirming Fifth Amended Joint Plan of Reorganization of MarkAir and MarkAir Express, as Modified, dated June 9, 1993 (hereinafter "Confirmation Order"), the Bankruptcy Court ordered . . . that the "protections" afforded the Service under the Collateral Order "shall remain in full force and effect in the event that the Debtor's case is converted to another chapter under the . . . Code (or reconverted to Chapter 11)

> or any subsequent case is filed by or against the Debtor under the Code." . . . The Bankruptcy Court further ordered that the "payments heretofore or hereafter made by, or for the benefit of the Debtor pursuant to the stipulations and agreements referenced in the Collateral Order shall be absolute, unconditional, and non-refundable, and shall not, under any conditions, by subject to avoidance or disgorgement to any person or entity, including any successor in interest to, or bankruptcy trustee of the Debtor."
>
> The Debtor failed to meet its obligations under the confirmed plan, and in April 1995, the Debtor filed a second Chapter 11 petition. Subsequently, the Debtor ceased operations, and in November 1995, the case was converted to one under Chapter 7. Thereafter, ARC released its claim against the ARC Collateral, and the United States moved for distribution of the ARC Collateral to the Service pursuant to the terms of the Collateral Agreement. . . . [T]he Trustee opposed the request and sought to subordinate the Service's lien to pay administrative expenses and other priority creditors under § 724(b).

Docket No. 20 at 4-7 (footnotes omitted).

The Bankruptcy Court

> conclud[ed] that § 724(b) was intended to apply to statutory tax liens, and not the contractual type of lien involved in this case. The meaning

> of the statute—that is the intent of Congress—is sufficiently ambiguous to permit reference to legislative history. That history shows that, in enacting § 724(b), Congress modified and expanded upon § 67c of the Bankruptcy Act, but did not intend to expand the coverage of the section to reach beyond statutory tax liens. . . .
>
> The IRS is entitled to recover its collateral, the $1.8 million deposit and accrued interest.

See Docket No. 17, Ex. 11 at 2. MarkAir disagreed with the Bankruptcy Court's decision and its interpretation and application of 11 U.S.C. § 724(b) and appealed it to this Court. *See* Docket No. 17 (Appeal); 20 (Opp'n); 24 (Reply).[1] MarkAir argues that "the IRS' judicial lien, which secures an allowed claim for a tax, is a 'lien' within the meaning of § 724(b) and is subject to tax lien subordination." *See* Docket No. 17 at 36. The Service argues that § 724(b) only applies to tax liens, which is a type of statutory lien and thus the contractual and judicial lien at issue here is not subject to subordination under § 724(b). *See* Docket No. 20 at 7-13.

DISCUSSION

I. Standard of Review

The Court must "review the bankruptcy court's conclusions of law de novo and must uphold its findings of

1. As this is an appeal from a final decision of the United States Bankruptcy Court for the District of Alaska, the Court has jurisdiction under 28 U.S.C. § 158(a)(1). *See* 28 U.S.C. § 158(a)(1).

fact unless they are clearly erroneous." *See In re Video Depot, Ltd.*, 127 F.3d 1195, 1197 (9th Cir. 1997). If there are no disputed factual issues, "[t]he bankruptcy court's grant of summary judgment is also reviewed de novo." *See In re Betacom of Phoenix, Inc.*, 240 F.3d 823, 828 (9th Cir. 2001).

II. Statutory and Judicial Liens

The Bankruptcy Code defines some of the terms at issue in the case at bar. " '[L]ien' means charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37).

> '[S]tatutory lien' means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

Id. § 101(53).[2] " '[J]udicial lien' means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." *Id.* § 101(36).

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2. "A statutory lien is a lien that arises strictly by operation of law without either the consent of the debtor or the involvement of a court in its creation. Typical statutory liens are mechanics' liens and tax liens." 1 *Robert E. Ginsberg & Robert D. Martin, Ginsberg & Martin On Bankruptcy*, § 6.02[D][2] (4th ed.2001) (footnote omitted).

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Various courts have noted that a tax lien is a type of statutory lien. *See In re Filipovits*, 1995 WL 724520, at *1 (Bankr. D. Md. Sept. 20, 1995) ("A tax lien is a statutory lien; and it is not a judicial lien."); *In re Carolina Resort Motels, Inc.*, 51 B.R. 447, 450 (Bankr. D.S.C. 1985) ("[A] tax lien is a statutory lien."); *In re E.W. Shields, Inc.*, 34 B.R. 44, 45 (Bankr. D. Or. 1983) ("[T]ax liens are statutory liens."). Moreover, leading treatises on bankruptcy law have agreed that a tax lien is a statutory lien. For example, *Collier on Bankruptcy* states that

> [t]he essence of the definition in section 101(53) is the need, or lack of need, for an agreement or judgment to create the lien. If the lien arises by force of statute, without any prior consent between the parties or judicial action, it will be deemed a statutory lien. . . . If the creation of the lien is dependent upon an agreement, it is a security interest even though there is a statute which may govern many aspects of the lien. The fact that a statute describes the characteristics and effects of a lien does not by itself make the lien a statutory lien. . . . Section 101(53) defines statutory liens to specifically exclude both judicial liens and security interest, thereby alleviating much confusion. The judicial lien is a creature of statute and is not dependent upon an agreement between the parties. More significantly, however, a judicial lien arises only by virtue of judicial proceedings in the absence of which there would not be such a lien. The statutory lien by definition arises without any judicial proceeding.

Appendix B

> Good examples of statutory liens are . . . tax liens[.]

See 2 *Collier On Bankruptcy*, ¶ 101.53 (Lawrence P. King ed., 15th ed. 2001) (footnotes omitted). Similarly, *Ginsberg and Martin on Bankruptcy* state that

> [t]ypical statutory liens are mechanics' liens and tax liens. Such liens survive against exempt property to the extent they are valid under nonbankruptcy law and stand up against the trustee's avoiding powers. In effect, the Bankruptcy Code is making a policy decision in favor of the . . . tax collector over the debtor's need for sufficient property to make a fresh start.

See Ginsberg & Martin, *supra* § 6.02[D][2] (footnotes omitted). Blacks Law Dictionary defines a tax lien as

> [a] statutory lien, existing in favor of the state or municipality, upon the lands of a person charged with taxes, binding the same either for the taxes assessed upon the specific tract of land or (in some jurisdictions) for all the taxes, due the individual, and which may be foreclosed for non-payment, by judgment of a court or sale of the land.

See Blacks Law Dictionary 1459 (6th ed. 1990).

It would then appear that the lien described in 11 U.S.C. § 724(b) is a statutory lien to the extent that it is a tax lien. *See* 11 U.S.C. § 724(b). As the parties agree that the Service

holds a contractual and judicial lien as opposed to a statutory lien, *see* Docket No. 17, Ex. 3, 11 U.S.C. § 724(b) is not applicable to the case at bar unless the type of lien described in 11 U.S.C. § 724(b) is something other than a tax lien. *See* Docket Nos. 17 at 5; 20 at 2-13. It is thus necessary for the Court to determine whether the lien at issue in 11 U.S.C. § 724(b) is a tax lien.

III. Statutory Construction

A. Plain Language

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Thus, when interpreting a bankruptcy statute, courts must first look to the plain language of the statute. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

"[I]n statutes that contain statutory definition sections, it is commonly understood that such definitions establish

meaning wherever the terms appear in the same Act." *In re Yochum*, 89 F.3d 661, 666 (9th Cir. 1996). "When . . . the meaning of a word is clearly explained in a statute, courts are not at liberty to look beyond the statutory definition." *United States v. Smith*, 155 F.3d 1051, 1057 (9th Cir. 1998). "In the absence of statutory definition, a statutory term will be accorded its ordinary meaning." *Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142, 1145 (9th Cir. 1998). Moreover,

> [p]articular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme. When we look to the plain language of a statute in order to interpret its meaning, we do more than view words or sub-sections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole.

See United States v. Hanousek, 176 F.3d 1116, 1120 (9th Cir. 1999) (internal quotations and citations omitted). "[A] word is known by the company it keeps (the doctrine of *noscitur a sociis)*. This rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (internal quotations omitted).[3] However, "if the statute

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3. The rule guided our earlier interpretation of the word "security" under the 1934 Act. The 1934 Act defines the term "security" to mean, *inter alia*, "any note." We concluded, nevertheless that, in context the phrase

(Cont'd)

is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation." *See Merkel v. Comm'r Internal Revenue*, 192 F.3d 844, 848 (9th Cir. 1999) (internal quotations omitted).

The statute at issue here, 11 U.S.C. § 724, provides that

> (a) The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title.
>
> (b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed—
>
> (1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;
>
> (2) second, to any holder of a claim of a kind specified in section 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of

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(Cont'd)

> 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the background of what Congress was attempting to accomplish in enacting the Securities Acts.

Gustafson, 513 U.S. at 575 (internal quotation omitted).

this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;

(3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph(2) of this subsection;

(4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;

(5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

(c) If more than one holder of a claim is entitled to distribution under a particular paragraph of subsection (b) of this section, distribution to such holders under such paragraph shall be in the same order as distribution to such holders would have been other than under this section.

(d) A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1986 shall be treated under

> subsection (b) of this section the same as if such lien were a tax lien.

See 11 U.S.C. § 724.

It would appear that 11 U.S.C. § 724(b) applies to property that is subject to a tax lien. Subsection (b) provides for distribution of the property subject to the lien, *see id.* § 724(b)(1)-(6), and the subsections refer to the amount secured by the tax lien. *See id.* Additionally, analyzing each section, *see, e.g.*, § 724(d), and construing the statute as whole, reveals that the lien described in § 724(b) is a statutory tax lien. Thus, a reasonable interpretation of the plain language reveals that the 11 U.S.C. § 724(b) applies to tax liens. Various courts and scholars agree. *See Pearlstein v. United States Small Bus. Admin.*, 719 F.2d 1169, 1175 (D.C. Cir. 1983) ("Section 724(b) subordinates tax liens to certain prior claims");[4] *In re Southeast R.R. Contractors*,

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4. The court in *Pearlstein v. United States Small Business Administration* stated that

> [Section 724(b)] sets forth in detail the consequences of this subordination on the order of distribution to all claimants against property in an estate (or its proceeds) that is subject to a tax lien.
>
> . . . .
>
> These provisions specify the effect of the subordination of a tax lien on the various other types of secured and unsecured claims. They do not, however, attempt

(Cont'd)

Inc., 235 B.R. 619, 624 n.4 (Bankr. E.D. Tenn. 1996) ("11 U.S.C. § 724(b) provides that property of the estate subject to certain tax liens may be used to pay the holders of priority claims set out in 11 U.S.C. § 507(a)(1)-(7)."); *In re A.G. Van Metre, Jr., Inc.*, 155 B.R. 118, 122 (Bankr. E.D. Va. 1993) ("The result of these provisions is to subordinate payment of statutory tax liens to the payment of administrative expenses (up to the amount of the tax liens) while leaving senior consensual lienholders, junior consensual lienholders and holders of unsecured claims undisturbed."); 6 *Collier*, ¶ 724.03, at 724-8 ("Section 724(b) provides a mechanism for subordinating tax liens to the payment of certain priority claims."); Judith Greenstone Miller, *Response to Government (Non-Tax) Working Group Amended Proposal # 2*, 102 Com. L.J. 205, 205 (1997) ("Section 724(b) changes the order of distribution when the personal and real property of the estate is subject to a valid federal, state or local tax lien which arose prior to the commencement of the case.)." Nonetheless, to the extent that § 724(b) is ambiguous because of the possible construction that the language "such tax lien" in the subsections refers to a type of lien other than a traditional statutory tax lien and could encompass other types of liens, it is instructive to refer to the legislative history.

(Cont'd)

> otherwise to change the order of distribution that would exist among those nontax claims apart from the subordination of the tax lien.

Pearlstein, 719 F.2d at 1175.

Appendix B

B. Legislative History

The Supreme Court has stated that "[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (internal quotations omitted). Analyzing the committee reports pertaining to 11 U.S.C. § 724(b) reveals that Congress intended that section to apply to tax liens. For example, the Committee Report from the Judiciary Committee in the House of Representatives stated that

> [s]ubsection (b) governs tax liens. It is derived from section 67c(3)[5] of the Bankruptcy Act, without substantial modification in result. It subordinates tax liens to administrative expense and wage claims, and solves certain circuity of liens problems that arise in connection with the subordination. The order of distribution of property subject to a tax lien is as follows: First, to holders of liens senior to the tax lien; second, to administrative expenses, wage claims, and consumer creditors

5. "Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this title." 11 U.S.C. § 107(c)(3) (1970) (codifying 67c(3) of the Bankruptcy Act). "[N]onstatutory tax liens [were] not affected by § 67c." 4 *Collier on Bankruptcy*, ¶ 67.27, at 377. "[T]he effect of section 67c is limited to statutory liens and does not include consensual liens." S. Rep. No. 89-1159 (1966).

> that are granted priority, but only to the extent of the amount of the allowed tax claim secured by the lien. In other words, the priority claimants step into the shoes of the tax collector. Third, to the tax claimant, to the extent that priority claimants did not use up his entire claim. Fourth, to junior lien holders. Fifth, to the tax collector to the extent that he was not paid under paragraph (3). Finally, any remaining property goes to the estate. The result of these provisions are to leave senior and junior lienors and holders of unsecured claims undisturbed. If there are any liens that are equal in status to the tax lien, they share pari passu with the tax lien under the distribution provisions of this subsection.

See H.R. Rep. No. 95-595, at 382 (1977), *reprinted in* 1978 U.S.C.C.A.N. at 6338; *see also Pearlstein*, 719 F.2d at 1171-75; 6 *Collier On Bankruptcy*, ¶ 724.LH[2] at 724-19.[6] Thus,

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6. Section 724(b) was derived from section 67c(3) of the Bankruptcy Act.

> It continues the longstanding policy under the Act of subordinating tax lien claims to certain priority claims. Section 724(b) is considerably broader, however, than was section 67c(3). Section 67c(3) applied only to tax liens on personal property unaccompanied by a change of possession. It did not apply to tax liens on real property nor did it apply to tax liens on personal property where the lien holder obtained possession of the property prior to bankruptcy. In contrast, section 724(b) applies to all types of property and is not dependent on possession.

(Cont'd)

the legislative history of 11 U.S.C. § 724(b) makes it evident that 11 U.S.C. § 724(b) specifically applies to statutory tax liens.

CONCLUSION

Because 11 U.S.C. § 724(b) pertains to statutory tax liens and not to the contractual and judicial lien in the case at bar, the Court shall affirm the Bankruptcy Court's decision.

IT IS THEREFORE ORDERED:

The appeal at **Docket No. 17** is **DENIED**. The Bankruptcy Court's decision is **AFFIRMED**.

Dated at Anchorage, Alaska, this 3 day of August 2001.

s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
United States District Judge

(Cont'd)

> Section 67c(3) subordinated payment of the tax lien claims to priority claims arising under clauses (1) and (2) of section 64 of the Act. These two clauses covered administrative expenses and wage priorities. It then directed payment of excess proceeds to the holder of the subordinated tax lien. The statute was not clear as to the status of junior liens on the property with the result that a circuity of liens problem often arose. This was corrected under section 724(b) which specifically provides for the treatment of junior liens vis-a-vis the holder of the displaced tax lien.

6 *Collier On Bankruptcy*, ¶ 724.LH[2] (footnote omitted).

APPENDIX C — MEMORANDUM DECISION AND ORDER REGARDING $1.8 MILLION IRS DEPOSIT OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ALASKA DATED AND FILED JULY 10, 2000

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ALASKA

JUDGE HERB ROSS

Case No. A95-00236-HAR
Chapter 7

In re

MARKAIR, INC., an Alaska corporation,

Debtor(s).

MEMORANDUM DECISION REGARDING $1.8 MILLION IRS DEPOSIT

The question is whether the trustee in this case (MarkAir 2) can avoid the IRS security interest in a deposit made in MarkAir's earlier bankruptcy (MarkAir 1)[1] to secure payment of taxes to the IRS. The extensive briefing in this matter is outlined in the Appendix to this *Memorandum*.

I hold that 11 USC § 724(b) cannot be invoked by the MarkAir 2 trustee to avoid a security interest granted to the IRS to secure its taxes. The legal analysis leading to this

1. *In re MarkAir, Inc.*; *In re MarkAir Exxpress, Inc.*, A92-00476-HAR and A92-00477-HAR.

holding is set out in the brief of Ron Goss, Esq., on behalf of Neil Bergt, entitled *Response Memorandum of Neil G. Bergt and Alaska International Industries, Inc. in Support of IRS Motion for Release of Registry Funds*,[2] I adopt Mr. Goss' argument.

Summarized, I conclude that § 724(b) was intended to apply to statutory tax liens, and not the contractual type of lien involved in this case. The meaning of the statute — that is, the intent of Congress — is sufficiently ambiguous to permit reference to legislative history. That history shows that, in enacting § 724(b), Congress modified and expanded upon § 67c of the Bankruptcy Act, but did not intend to expand the coverage of the section to reach beyond statutory tax liens.

This decision makes it unnecessary to address additional arguments raised by Bergt and the IRS.

The IRS is entitled to recover its collateral, the $1.8 million deposit and accrued interest. A separate, final order will be entered.

DATED: July 10, 2000

s/ Herbert A. Ross
HERBERT A. ROSS
U.S. Bankruptcy Judge

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2. Docket Entry 2581, filed October 16, 1996, at pages 1-39 (to line 13), and pages 44-45 (Points 1-9).

Appendix C

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ALASKA

JUDGE HERB ROSS

Case No. A95-00236-HAR
Chapter 7

In re

MARKAIR, INC., an Alaska corporation,

Debtor(s).

ORDER REGARDING $1.8 MILLION IRS DEPOSIT

For the reasons stated in the *Memorandum Decision Regarding $1.8 Million IRS Deposit* being filed concurrent with this order,

IT IS ORDERED that the $1.8 million deposit originally held in the registry of the court to secure payment of a claim of the Internal Revenue Service in MarkAir, Inc.'s prior case,[1] plus any accrued interest, be released to the IRS within 10 days of this order becoming final and nonappealable. The trustee is granted 30 days from entry of this order to file a notice of appeal or a tolling motion.

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1. *In re MarkAir, Inc.*; *In re MarkAir Exxpress, Inc.*, A92-00476-HAR and A92-00477-HAR.

Appendix C

DATED: July 10, 2000

s/ Herbert A. Ross
HERBERT A. ROSS
U.S. Bankruptcy Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC DATED AND FILED DECEMBER 13, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-35819
D.C. No. CV-00-00206-JKS

In re: BANKRUPTCY ESTATE OF MARKAIR, INC.,

Debtor.

WILLIAM BARSTOW, III,

Appellant,

v.

UNITED STATES INTERNAL REVENUE SERVICE,

Appellee.

ORDER

Before: B. FLETCHER, ALARCON, and GRABER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Graber has voted to deny the petition for rehearing en banc and Judges Fletcher and Alarcon have so recommended.

Appendix D

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX E — EXAMPLES OF SUCH USEAGE IN TITLE 11[1]

		such [noun]	antecedent
1.	103(d)	"such chapter"	"Chapter 7"
2.	103(g) and (h)	"such chapter"	"chapter 11"
3.	103(i)	"such chapter"	"chapter 13"
4.	103(j)	"such chapter"	"chapter 12"
5.	104(b)(3)	"such adjustments"	"adjustments made in accordance with paragraph (1)"
6.	106(a)(2) and (a)(3)	"such sections"	the sections of title 11 enumerated in § 106(a)(1)
7.	108(a)	"such period"	"a period within which the debtor may commence an action"

1. This is a partial listing of samples from Chapters 1, 3, and 5 of Title 11. Additional examples can be found in those Chapters and in Chapters 7, 9, 11, 12, and 13 of Title 11.

Appendix E

		such [noun]	**antecedent**
8.	108(b)	"such period"	"a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice or proof of claim or loss, cure a default or perform any other similar act"
9.	108(c)	"such period"	"a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title"
10.	110(b)(2), (c)(3) and (d)(2)	"such failure"	"fails to comply with paragraph (1)"
11.	110(h)(4)	"such order"	"a court order to turn over funds"

Appendix E

	such [noun]	**antecedent**
12. 301 and 302(a)	"such chapter"	"a chapter of this title"
13. 303(b)(1) and (2)	"such claims"	"a claim against such person that is not contingent as to liability or the subject of a bona fide dispute"
14. 303(g)	"such property"	"property in the possession of a trustee ordered appointed under this subsection"
15. 304(b)(1)(A)	"such property"	"property involved in such foreign proceeding"
16. 328(a)	"such terms and conditions"	"any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis"
17. 328(b)	"such attorney or accountant"	"an attorney or accountant for the estate"
18. 328(c)	"such professional person"	"a professional person employed under Section 327 or 1103 of this title . . ."

Appendix E

		such [noun]	**antecedent**
19.	329(a)	"such attorney"	"any attorney representing a debtor in a case under this title, or in connection with such a case"
20.	330(b)(1)	"such case"	"a case under Chapter 7 of this title"
21.	331	"such date"	"the date of such an application"
22.	342(b)	"such individual"	"an individual whose debts are primarily consumer debts"
23.	342(c)	"such information"	"the name, address, and taxpayer identification number of the debtor"
24.	345(a)	"such trustee"	"a trustee in a case under this title"
25.	346(c)(1)	"such case"	"a case under this title concerning a corporation or a partnership"

Appendix E

		such [noun]	**antecedent**
26.	346(e)	"such claim"	"a claim allowed under 502(f) or 503 of this title, other than a claim for a tax that is not otherwise deductible or a capital expenditure that is not otherwise deductible"
27.	346(f)	"such withheld or collected amount"	"any amount required to be withheld or collected under applicable state or local tax law"
28.	346(f)	"such tax law"	"applicable state or local tax law"
29.	346(i)(2)	"such tax attributes"	"any tax attribute to which the estate succeeded under paragraph (1) of this subsection but that was not utilized by the estate"
30.	346(i)(3)	"such order"	"the order for relief under such chapter"
31.	348(e)	"such conversion"	"conversion of a case under section 706, 1112, 1208, or 1307 of this title"
32.	349(b)(3)	"such property"	"the property of the estate"

Appendix E

		such [noun]	**antecedent**
33.	361(1) and (2)	"such stay, use, sale, lease, or grant"	"the stay under Section 362 of this title, use, sale or lease under section 363 of this title, or any grant of a lien under section 364 of this title"
34.	362(b)(3)	"such act"	"any act to perfect, or to maintain or continue the perfection of an interest in property"
35.	362(b)(16)	"such Act"	"the Higher Education Act of 1965"
36.	362(d)	"such stay"	"the stay provided under subsection (a) of this section"
37.	362(e)	"such stay"	"the stay of any act against property of the estate under subsection (a) of this section"
38.	362(e)	"such final hearing"	"the final hearing under subsection (d) of this section"
39.	362(f)	"such interest"	"the interest of an entity in property"

Appendix E

		such [noun]	**antecedent**
40.	362(g)	"such relief"	"relief from the stay of any act under subsection (a) of this section"
41.	363(b)(2)	"such section"	"section 7A of the Clayton Act"
42.	363(f)	"such entity"	"an entity other than the estate"
43.	363(f)	"such interest"	"any interest in such property of an entity other than the estate"
44.	363(f)/363(b) and (c)	"such property"	"property of the estate"
45.	363(h)	"such property"	"property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety"

Appendix E

	such [noun]	**antecedent**
46. 363(i)	"such property"	"property to which subsection (g) or (h) of this section applies, or property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case"
47. 363(j)	"such sale"	"a sale of property to which subsection (g) or (h) of this section applies"
48. 363(k)	"such sale"	"a sale under subsection (b) of this section"
49. 363(k)	"such claim"	"a lien that secures an allowed claim"
50. 363(m)	"such " authorization	"an authorization under subsection (b) or (c) of this section of a sale or lease of property"
51. 363(n)	"such sale"	"a sale under this section"
52. 363(n)	"such agreement"	"an agreement among potential bidders at such sale"

Appendix E

		such [noun]	**antecedent**
53.	363(n)	"such amount"	"any amount by which the value of the property sold exceeds the price at which such sale was consummated"
54.	363(n)	"such party"	"a party to such agreement"
55.	363(o)	"such interest"	"an interest in property"
56.	365(b)(1)	"such contract or lease"	"an executory contract or unexpired lease of the debtor"
57.	365(b)(1)	"such default"	"default in an executory contract or unexpired lease of the debtor"
58.	365(b)(1)	"such party"	"a party other than the debtor to such contract or lease"
59.	365(b)(2)	"such commencement"	"the commencement of a case under this title"
60.	365(b)(3)	"such lease"	"a lease of real property in a shopping center"
61.	365(b)(3)(c)	"such provision"	"all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision"

Appendix E

		such [noun]	**antecedent**
62.	365(c)	"such contract or lease"	"any executory contract or unexpired lease of debtor"
63.	365(c)(1)	"such party"	"a party, other than the debtor, to such contract or lease"
64.	365(d)(1) and 365(d)(2)	"such contract or lease"	"an executory contract or unexpired lease of residential real property or of personal property of the debtor"
65.	365(d)(3)	"such lease"	"any unexpired lease of nonresidential real property"
66.	365(d)(3)	"such performance"	"performance of any such obligation that arises within 60 days after the date of the order for relief"
67.	365(d)(4)	"such lease"	"an unexpired lease of nonresidential real property"
68.	365(d)(5)	"such lease"	"an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate"

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		such [noun]	**antecedent**
69.	365(d)(9)	"such debtor"	"the debtor that is an affected air carrier"
70.	365(d)(10)	"such lease"	"an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes)"
71.	365(e)(1)	"such contract or lease"	"an executory contract or unexpired lease"
72.	365(e)(1)	"such commencement"	"the commencement of a case under this title"
73.	365(e)(2)	"such contract or lease"	"an executory contract or unexpired lease of the debtor"
74.	365(e)(2)	"such party"	"a party, other than the debtor, to such contract or lease"

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		such [noun]	**antecedent**
75.	365(f)(3)	"such provision"	"a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease"
76.	365(g)	"such rejection"	"the rejection of an executory contract or unexpired lease of the debtor"
77.	365(h)(1)(A)	"such lease"	"an unexpired lease of real property under which the debtor is the lessor"

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		such [noun]	**antecedent**
78.	365(h)(1)(A)(ii)	"such rights"	"rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property"
79.	365(h)(2)(A)	"such timeshare interest"	"a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller"
80.	365(i)(2)(A)	"such payments"	"all payments due under such contract"
81.	365(j)	"such party"	"a party whose executory contract to purchase real property from the debtor is rejected"
82.	365(k)	"such contract lease"	"a contract or lease or assumed under this section"

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	such [noun]	**antecedent**
83. 365(n)(l)	"such contract"	"an executory contract under which the debtor is a licensor of a right to intellectual property"
84. 365(n)(1)(B)	"such rights"	"rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law)"
85. 501(d)	"such claim"	"a claim of a kind specified in section 502(e)(2), 502(f), 502(g), 502(h) or 502(i) of this title"

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	such [noun]	**antecedent**
86. 502(b)(6)	"such lease"	"a lease of real property"
87. 502(b)(7)	"such lease"	"an employment contract"
88. 502(d)	"such entity transferee"	"any entity from which or property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title"
89. 502(e)(1)	"such claim reimbursement contribution"	"any claim for for reimbursement or or contribution of an entity that is liable with the debtor on, or has secured, the claim of a creditor"
90. 502(f)	"such claim"	"a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief"

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		such [noun]	**antecedent**
91.	502(g)	"such claim"	"A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed"
92.	502(h)	"such claim"	"A claim arising from the recovery of property under section 522, 550, or 553 of this title"
93.	502(i)	"such claim"	"A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title"
94.	502(j)	"such holder" claim"	"a holder of an allowed
95.	503(a)	"such request"	"a request for payment of an administrative expense"

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		such [noun]	**antecedent**
96.	503(b)(1)(B)(ii)	"such adjustment"	"a tentative carryback adjustment that the estate received"
97.	503(b)(3)(E)	"such custodian"	"a custodian superseded under section 543 of this title"
98.	503(b)(3)(F)	"such committee"	"a committee appointed under section 1102 of this title"
99.	503(b)(5)	"such services"	"services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title"
100.	504(a)	"such compensation or reimbursement"	"compensation or reimbursement under section 503(b)(2) or 503(b)(4) of this title"
101.	504(b)(2)	"such creditor's attorney"	"An attorney for a creditor that files a petition under section 303 of this title"
102.	505(a)(2)	"such amount or legality"	"the amount or legality of a tax, fine, penalty, or addition to tax"

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		such [noun]	**antecedent**
103.	505(a)(2)	"such governmental unit"	"the governmental unit from which such refund is claimed"
104.	505(b)	"such tax"	"any tax incurred during the administration of the case"
105.	505(b)	"such governmental unit"	"the governmental unit charged with responsibility for collection or determination of such tax"
106.	506(a)	"such property"	"property in which the estate has an interest"
107.	506(b)	"such claim"	"an allowed secured claim"
108.	506(c)	"such property"	"property securing an allowed secured claim"
109.	506(d)	"such claim"	"a claim against the debtor that is not an allowed secured claim"
110.	507(a)(4)	"such plan"	"an employee benefit plan"

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		such [noun]	**antecedent**
111.	507(a)(7)	"such debt"	"debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement"
112.	507(a)(8)	"such claims"	"allowed unsecured claims of governmental units"
113.	507(a)(8)(D)	"such date"	"the date of the filing of the petition"
114.	507(b)	"such creditor"	"a holder of a claim secured by a lien on property of the debtor"
115.	507(b)	"such subsection"	"subsection (a)(1) of this section"

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		such [noun]	**antecedent**
116.	507(c)	"such refund credit"	"an erroneous refund or or credit of a tax"
117.	508(b)	"such partner"	"a general partner that is not a debtor in a case under chapter 7 of this title"
118.	509(a) and (b)	"such entity"	"an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim"
119.	510(a)	"such agreement"	"A subordination agreement"
120.	510(b)	"such security"	"a security of the debtor or of an affiliate of the debtor"
121.	522(a)(2)	"such date"	"the date of the filing of the petition"
122.	522(d)(10)(E)	"such plan or contract"	"a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service"

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		such [noun]	**antecedent**
123.	522(e)	"such claim"	"an unsecured claim against the debtor"
124.	522(g)	"such property"	"property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title"
125.	522(l)	"such list"	"a list of property that the debtor claims as exempt under subsection (b)"
126.	523(a)(12)	"such commitment"	"any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution"
127.	523(b)	"such debt"	"a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act

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		such [noun]	**antecedent**
			in a prior case concerning the debtor under this title, or under the Bankruptcy Act"
128.	523(c)(1)	"such debt"	"a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section"
129.	523(d)	"such debt"	"a consumer debt under subsection (a)(2) of this section"
130.	524(a)	"such debt"	"any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title"
131.	524(c)	"such agreement"	"An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title"
132.	524(d)	"such agreement"	"an agreement of the kind specified in subsection (c) of this section"

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		such [noun]	**antecedent**
133.	525(a)	"such bankrupt or debtor"	"a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act"
134.	541(a)(5)	"such date"	"the date of the filing of the petition"
135.	542(b)	"such debt"	"a debt that is property of the estate and that is matured, payable on demand, or payable on order"
136.	543(a)	"such custodian"	"A custodian with knowledge of the commencement of a case under this title concerning the debtor"
137.	545	"such statutory lien"	"a statutory lien on property of the debtor"
138.	546(b)(1)	"such maintenance or continuation"	"the maintenance or continuation of perfection of an interest in property"

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		such [noun]	**antecedent**
139.	546(d)	"such producer or fisherman"	"a producer of grain sold to a grain storage facility, owned or operated by the debtor, in the ordinary course of such seller's business (as such terms are defined in section 557 of this title) . . . a United States fisherman who has caught fish sold to a fish processing facility owned or operated by the debtor in the ordinary course of such fisherman's business"
140.	546(h)	"such goods"	"goods shipped to the debtor by the creditor before the commencement of the case"
141.	547(c)(5)	"such security interest"	"a perfected security interest in inventory or a receivable or the proceeds of either"
142.	547(d)	"such surety"	"a surety that furnished a bond or other obligation to dissolve a judicial lien"

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		such [noun]	**antecedent**
143.	547(e)(1)(A)	"such transfer"	"a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property"
144.	548(a)(1)	"such transfer"	"any transfer of an interest of the debtor in property"
145.	548(c)	"such transferee or obligee"	"a transferee or obligee of such a transfer or obligation that takes for value and in good faith"
146.	549(c)	"such good faith purchaser"	"a good faith purchaser without knowledge of the commencement of the case"
148.	557(c)(1)	"such procedures"	"procedures for the determination of interests in and the disposition of grain and the proceeds of grain"
149.	557(e)	"Any such governmental unit"	"Any governmental unit that has regulatory jurisdiction over the operation or liquidation of the debtor or the debtor's business"

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	such [noun]	**antecedent**
150. 558	"any such defense"	"any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses."
151. 559	"such assets"	"assets subject to repurchase agreements"

APPENDIX F — EXAMPLES OF JUDICIAL LIENS SECURING TAX CLAIMS

See, e.g., Seattle Association of Creditmen v. American Alliance, 257 P.2d 637, 639 (Wa. 1953) (judgment entered by a court for tax liability "must be accorded the same effect as if it had been obtained in a civil action," and tax collector may "proceed by way of levy and execution as in a civil judgment *in personam* . . ."); *Garrett v. Cline*, 394 P.2d 157, 159 (Idaho 1964) (liability for unemployment taxes evidenced by judgment docketed with the clerk of the court which becomes a judicial lien on nonexempt property of the taxpayer: "Such lien may be enforced . . . in the same manner as a judgment of the district court duly docketed . . ."); *Paper Products of Laurel, Inc. v. Mississippi*, 206 S.2d 635, 637-638 (Miss. 1968) (sales tax lien effected by filing of record with clerk of circuit court: "Such judgment shall be equivalent of any enrolled judgment of a court of record and shall serve as authority for the issuance of writs of execution, writs of attachment, writs of garnishment or other remedial writs [quoting the statute] . . . The tax lien established is the equivalent of, in fact is, a judgment at law with the same rules relating to priority as any other judgment at law."); *Wheeler v. State of Oklahoma*, 665 P.2d 814, 815 (Ok. 1983) (under 1951 code of laws "a lien established through the tax warrant procedure is treated the same as a judgment rendered in a court of record and is subject to the dormancy statute . . ." There a judicial lien for taxes lapsed for failure to execute within the time limits set by law for enforcement of judgments.)

See, e.g., § 44-1-29 of the codified laws of Rhode Island (providing that for any unpaid tax or penalty the tax collector "may petition the Sixth Division of the District Court for a

writ of execution . . . If upon the hearing it shall appear that the tax or penalty is unpaid, the court shall forthwith issue an execution for the collection of the tax or penalty" including seizure and judicial sale of property); *Comptroller of the Treasury v. Washington Restaurant Group, Inc.*, 664 A.2d 899, 901 (Md. App. 1995) (Maryland tax collection statute "includes the authority to use a writ of execution to enforce a tax lien."); *Inman v. Farmer's National Company*, 783 P.2d 1328, 1330-1331 (Mt. 1990) (obligation for payment of personal property taxes may be enforced by writ of execution in the same manner as a judgment of a court of record "and with the same execution remedies as a judgment creditor."); Montana Code § 15-1-701 (tax warrant filed with state district court becomes a judgment and the tax collector becomes a judgment lien creditor: "the department may collect delinquent taxes and enforce the tax lien in the same manner as a judgment is enforced."); Pennsylvania Code of Law 72 P.S. § 8112-C (a.1) (tax lien "shall be indexed as judgments are now indexed" and may be enforced by writ of execution and by judicial sale. The lien is also subject to the requirement for renewal in the same manner as any other judgment lien.) *Goldsboro Milling Company v. Reaves*, 804 F. Supp. 762, 766 (D. N.C. 1991) (judgment for taxes is "a lien on all the real property owned by the [taxpayer] judgment debtor" in the county where the judgment is docketed, applying North Carolina law).

APPENDIX G — STATUTES INVOLVED

11 U.S.C. § 101. Definitions

In this title —

* * *

(36) "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

(37) "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation;

* * *

(51) "security interest" means lien created by an agreement;

* * *

(53) "statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute;

* * * *

Appendix G

11 U.S.C. § 724. Treatment of certain liens.

(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed—

(1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;

(2) second, to any holder of a claim of a kind specified in sections 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;

(3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;

(4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;

(5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

* * *

(d) A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1986 shall be treated under subsection (b) of this section the same as if such lien were a tax lien.

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Former 11 U.S.C. § 107c(3)
[Chandler Act § 67c(3) as amended in 1966].

Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. Where such a tax lien is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived form the sale of the personal property to which the tax lien attaches, less the actual cost of that sale, of an amount not in excess of the tax lien, to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. If the amount realized from the sale exceeds the total of such debts, after allowing for prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act and the amount of the tax lien, is to be paid to the holder of the tax lien. PL 89-495; 80 Stat. 268 § 4.